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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-907

OSCAR YEAGER and ANNA C. YEAGER,

Petitioners,

v.

TOWNSHIP OF MANSFIELD, WARREN COUNTY, NEW JERSEY, a municipal corporation, TOWNSHIP COMMITTEE OF MANSFIELD, and the BOARD OF ADJUSTMENT of the TOWNSHIP OF MANSFIELD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ~~SUPREME~~ Superior COURT OF NEW JERSEY, Appellate Div.

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IN THE

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No.

OSCAR YEAGER and ANNA C. YEAGER,

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v.

TOWNSHIP OF MANSFIELD, WARREN COUNTY, NEW JERSEY, a municipal corporation, TOWNSHIP COMMITTEE OF MANSFIELD, and the BOARD OF ADJUSTMENT of the TOWNSHIP OF MANSFIELD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The petitioners, Oscar Yeager and Anna C. Yeager, respectfully pray that a Writ of Certiorari issue to review the decision of the Supreme Court of New Jersey, entered in this proceeding on September 21, 1972.

Opinions Below

The decision of the Supreme Court of New Jersey, unreported, appears in the Appendix hereto (App. A p. 1a). The judgment and opinion of the Superior Court of New Jersey, Appellate Division, unreported, appears in the Appendix hereto (App. B p. 2a). The unreported trial court judgment and opinion rendered by the Superior Court, Law Division, Warren County, New Jersey also appears in the Appendix hereto (App. C p. 5a).

Jurisdiction

The judgment of the Superior Court of New Jersey, Appellate Division was entered June 22, 1972. A timely petition for certification to review the Appellate Court judgment was filed with the Supreme Court of New Jersey, which petition was denied on September 21, 1972, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A. 1257(3).

Questions Presented

1. Whether a zoning ordinance which totally prohibits mobile home parks from a municipality violates the supremacy Clause, U.S.C.A. Const. Art. 6 cl. 2, by frustrating the purpose of federal legislation which authorizes loan guaranty benefits and mortgage insurance for purchase of mobile homes.

2. Whether a zoning ordinance which totally prohibits mobile home parks from a municipality violates the constitutional safe guards announced in U.S.C.A. Const. Amend. 14, Sec. 1 which protect against deprivation of property without due process of law, and guaranty equal protection under the laws.

Constitutional and Statutory Provisions Involved

The relevant constitutional and statutory provisions involved are set forth in the Appendix hereto, (App. D pp. 19a to 21a).

Statement of the Case

Petitioners are owners of approximately 128 acres of property, a small portion of which, measuring 1200 feet by approximately 400 feet, was originally projected for use as a mobile home park. The property is situate in the northwestern portion of New Jersey, in the Township of Mansfield, Warren County. The characteristics of the subject property and surrounding area may be succinctly described as rural, generally undeveloped, sparsely settled, and dominated by mountains and woods.

A review of three separate years provides a capsule history of events leading to this proceeding:

(1) 1960—Petitioners obtained a license from the municipality to operate a mobile home park on their property, and commenced construction and development of said park;

(2) 1964—Municipality passed its initial zoning ordinance whereby mobile home parks were totally precluded from the Township;

(3) 1969—Board of Adjustment denied petitioners' application to continue construction of their existing mobile home park as a valid prior non conforming use, and denied petitioners' application for a variance.

Following the denial of their application by the Board of Adjustment, petitioners instituted suit in the Superior

Court of New Jersey, Law Division, challenging both the action of the board and the constitutional validity of that portion of the zoning ordinance which totally prohibits mobile home parks. The evidence presented to the board as well as the proofs offered at trial clearly indicate that there is a substantial need for mobile home park facilities not only in Mansfield Township but throughout the state and country as well.

"How Federal Question is Presented"

a) To trial court:

By pleadings, petitioners alleged that the total prohibition of mobile home parks constitutes a deprivation of property without due process of law and a denial of equal protection under the law. At trial, petitioners challenged the constitutionality of the prohibitory ordinance as violative of federal public policy favoring mobile homes and mobile home parks, evidenced by federal legislation authorizing VA and FHA guaranty of loans for the purchase of mobile homes.

The trial court rejected petitioners' argument, holding that:

> "The Supreme Court in New Jersey in the case of *Vickers* v. *Twp. Committee of Gloucester Twp.*, 37 N.J. 232 (1962) [181 A. 2d 129] held that a zoning ordinance precluding trailer camps and trailer parks was valid."
>
> • • •
>
> "The plaintiffs make a strong argument for not following *Vickers, supra,* however, that question is not for this Court but for the Legislature." (App. p. 17a)

b) To appellate division:

Petitioners again challenged the constitutionality of the prohibitory ordinance by brief and oral argument to the Superior Court, Appellate Division.

In affirming the judgment under review, the Appellate Division observed that:

> "We are constrained to reach that conclusion in light of the findings of fact by the trial court, our decisional law adverse to expansions of non conforming uses, and the policy of our State as expressed in *Vickers* v. *Twp. Com. of Gloucester Twp.*, 37 N. J. 232 (1962), appeal dismissed and *cert.* den. 371 U. S. 233 (1963), reversing the decision of this court in that case reported at 68 N. J. Super. 263 (App. Div. 1961)" (App. B, p. 3a)

Timely petition was filed with the Supreme Court of New Jersey seeking certification to review the decision of the Appellate Division which, among other things erroneously applied the *Vickers, supra* decision on a per se basis to validate exclusionary zoning. Petitioners also sought reassessment, restriction and, to the extent necessary, an overruling of the *Vickers* decision. The New Jersey Supreme Court declined to exercise its discretionary power, however, and denied the petition for certification. (App. A p. 1a).

REASONS FOR GRANTING THE WRIT

1. The decision below establishes law in the State of New Jersey which undermines and frustrates federal legislation, thus presenting a significant question under the Supremacy Clause, U.S.C.A. Const. Art. 6, cl. 2 mandating review by this Court.

Mobile home living has become an accepted and vitally necessary alternative in meeting the housing crisis which grips this nation. Clear expression of federal public policy which supports this housing alternative is demonstrated by Congressional enactment of the "Veterans' Housing Act of 1970; as amended, 84 Stat. 1108, 38 U.S.C.A. 1819 (App. D p. 20a) whereby the Administrator may guaranty loans to veterans for the purchase of mobile homes; and by Congressional enactment of the "Housing and Urban Development Act of 1969", as amended, 83 Stat. 379, 12 U.S.C.A. sec. 1703, (App. D p. 20a), whereby the Secretary of Housing and Urban Development is empowered to insure mortgages for the purchase of mobile homes.

In the instant case, the Supreme Court of New Jersey, by its decision not to grant certification (App. A p. 1a) has upheld the decision of the Superior Court, Appellate Division, (App. pp. 2a to 4a) wherein a zoning ordinance which totally excludes mobile home parks from an admittedly rural and largely undeveloped municipality was found to be constitutionally valid. In their written opinion (App. B p. 4a) the Appellate Division made the significant observation that the policy in our State with respect to the total prohibition of mobile home parks from a municipality is expressed in *Vickers* v. *Tp. Com. of Gloucester Tp.*, 37 N. J. 232 (1962), appeal dismissed and *cert.* den. 371 U. S. 233 (1963). In *Vickers*, our Supreme

Court, approximately ten years ago, also upheld the constitutional validity of a zoning ordinance totally prohibiting mobile home parks. Times have changed and the *Vickers* dissent by Justice Hall seems even more appropriate now than when it was written.

The direct holding of the decision under review is that mobile home parks may be totally excluded from Mansfield Township. The more significant impact of the subject decision, however, taken in context with *Vickers, supra,* is that any and all municipalities in the State of New Jersey may exclude mobile home parks from their boundaries under the guise of reasonable zoning regulation. Absent mobile home parks, (i.e. sites on which to locate the mobile homes) the aforementioned Congressional enactments, designed to assist in the purchase of mobile homes, are virtually meaningless in both Mansfield Township and New Jersey.

Clearly, therefore, the current status of the law in the State of New Jersey frustrates the federal legislation pertaining to mobile homes, and severely impairs the efficiency of the federal government agencies as they attempt to perform their duties with respect to this legislation.

Every state is bound by the Constitution and Laws of the United States, and a state law which frustrates the purpose of national legislation will be invalidated under the Supremacy Clause of the Constitution (App. D p. 19a). *Perez* v. *Campbell,* 402 U. S. 637 (1971); *Nash* v. *Florida Industrial Commission,* 389 U. S. 235 (1967).

2. The decision below, by sanctioning the total prohibition of mobile home parks from a municipality, raises grave questions concerning infringement upon Constitutionally protected rights announced by the 14th Amendment.

a) The decision under review, erroneously it is contended, upholds the constitutional validity of an ordinance which totally prohibits the legitimate business use of mobile home parks under the guise of zoning regulation. Petitioners contend and have contended throughout these proceedings that regulation does not mean or permit prohibition; and that prohibition is an unreasonable and unconstitutionally excessive exercise of police power. Where an ordinance clearly intrudes upon rights (e.g. property rights) protected by the fundamental law without bearing a substantial relation to health, safety, or the general welfare, it must be declared unconstitutional *Village of Euclid, Ohio* v. *Ambler Realty Co.*, 272 U. S. 365 (1926); *Robertson* v. *City of Salem*, 191 F. Supp. 604 (D. C. Oregon 1961).

Petitioners are directly affected by this excessive exercise of police power, being precluded from completing their mobile home park as originally projected, and being deprived thereby, of the appropriate, reasonable and economic use of their property without due process of law.

Even more significant than the unconscionable and unconstitutional treatment visited upon petitioners by this prohibitory ordinance, however, is the impact of this decision on everyone, including purchasers, connected with the mobile home industry. The decision stands as precedent for municipalities throughout New Jersey, as well as any other state which chooses to adopt the New Jersey rule, to preclude mobile home parks from their boundaries. Needless to say, this decision also has a very chilling

effect upon future development of mobile homes and mobile home park facilities in New Jersey and elsewhere.

The total prohibition of a legitimate use, as opposed to its regulation, must bear a very strong and genuine relationship to the enhancement of the general welfare of the community. See *Kirsch Holding Co.* v. *Borough of Manasquan,* 59 N. J. 241 (1971) 281 A. 2d 513 for recent New Jersey expression of this principle. Petitioners recognize that the burden of proof is on the party attacking a zoning ordinance. Once it is shown, however, that a business use is legitimate and is in conformity with all other zoning and building code requirements, the onus is then placed upon the municipality to explain the benefit to the general welfare or other legitimate zoning criteria sought to be achieved by the total prohibition of that business use. *Exton Quarries, Inc.* v. *Zoning Board of Adjustment,* 228 A. 2d 169 (Pa. 1967); *Beaver Gasoline Co.* v. *Zoning Hearing Board of Borough of Osborne,* 275 A. 2d 702 (Pa. 1971); 57 *Cornell Law Review* 461 (1972).

In the instant case, petitioners contend that there has been no showing of reasonable nexus between any valid zoning objective and the total prohibition of mobile home parks from the rural municipality of Mansfield Township. Failure by the New Jersey Supreme Court to overturn the subject ordinance and protect petitioners' constitutional property rights is therefore plain error raising serious questions of substantive due process which demand review by this Court.

b) The failure of the New Jersey Supreme Court to review and overturn the prohibitory ordinance challenged herein denies petitioners equal protection under the laws.

In the recent case of *DeSimone* v. *Greater Englewood Housing Corp. No. 1,* 56 N. J. 428, 267 A. 2d 31 (1970),

the Supreme Court of New Jersey upheld a variance permitting the construction of low cost housing projects. Petitioners' mobile home park facility also affords low cost housing accomodations. The failure, therefore, to provide petitioners with comparable zoning treatment for their offer of comparable services at a comparable price denies them equal protection under the laws to engage in the same or similar legitimate business use of their property and to utilize their property for its appropriate, reasonable and economic purpose.

This denial of equal protection under the laws, emanating from the decision under review, extends beyond fundamentally protected property rights, however, and severely infringes upon another fundamental right—that being the right to decent shelter.

The "Veterans' Housing Act of 1970", as amended, 84 Stat. 1108, 38 U.S.C.A. 1819; and the "Housing and Urban Development Act of 1969" as amended, 83 Stat. 379, 12 U.S.C.A. sec. 1703, hereinabove discussed, clearly demonstrates that access to decent housing for every American family is a priority goal of the federal government. The right to that decent housing thus rises to the status of a fundamentally protected right under the Constitution.

Exclusionary zoning substantially impairs that fundamental right to decent housing without serving any compelling state interest.

New Jersey courts have recognized that zoning ordinances containing excessive and unreasonable restrictions designed to discourage or exclude the development of certain types of housing accommodations can no longer be tolerated. *Oakwood at Madison, Inc.* v. *Tp. of Madison,* 117 N. J. Super. 11 (Law Div. 1971), 283 A. 2d 353; *Southern Burl. Cty. N.A.A.C.P.* v. *Tp. Mt. Laurel,* 119

N. J. Super. 164 (Law Div. 1972), 290 A. 2d 465; and *J. D. Const.* v. *Bd. of Adjust. Tp. Freehold,* 119 N. J. Super. 140 (Law Div. 1972), 290 A. 2d 461.

What makes the exclusionary ordinance hereunder review even more intollerable is that it deprives persons with low, moderate, and fixed incomes from obtaining decent shelter so sorely needed. The demand for the type housing facility offered by petitioners is unrefuted on the record, and if allowed to develop as originally projected, their facility will help respond to the public need for decent housing.

The zoning exclusion of this type facility unjustly deprives a portion of the public from their choice of housing. Veterans and F.H.A. applicants, for example, who seek federal assistance to purchase mobile homes are prevented from living in Mansfield Township because no site on which to place their home is available; whereas their counterparts who seek federal assistance to purchase a conventional home find no such impediment to their residence in the Township. This blatant denial of equal protection has direct and significant consequences to petitioners, including a discriminatory and unjust deprivation to them of any benefits which they might otherwise realize from the federal mobile home programs previously discussed.

The approval by our highest court of this exclusionary ordinance, fraught with constitutional infirmities as indicated herein, raises serious questions concerning fundamentally protected rights which justify the grant of certiorari to review the judgment below.

c) As noted above, the decision under review is clearly predicated upon the holding in *Vickers* v. *Township Committee of Gloucester Township,* 37 N. J. 232 (1962). What

must not be overlooked, however, is the extensive dissenting opinion, written by Mr. Justice Hall, particular reference being directed to his comments at page 268:

> "In the face of these facts, it is arbitrary to permit the prohibition of mobile home parks completely in a municipality where they can be placed in appropriate districts and in which there is a need or demand for them. To hold otherwise would be to allow any method of housing to be outlawed by local whim. I cannot understand how, in a large and roomy township, a properly situated and regulated mobile home park can have a detrimental effect on the value of all the property in the township or on its overall attractiveness any more than industrial and commercial districts or even small lot housing developments. (5)"

The persuasiveness of his logic is compelling, and the applicability of his conclusion to the subject case is unmistakable. The dissent of yesterday must be the decision of today if there is to be hope in the housing field for tomorrow.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the Supreme Court of New Jersey declining review of the judgment and opinion of the New Jersey Superior Court, Appellate Division.

Respectfully submitted,

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Counsel for Petitioners

December 20, 1972

APPENDIX A

Order of the Supreme Court of New Jersey Denying Certification

SUPREME COURT OF NEW JERSEY
C-29 September Term 1972

OSCAR YEAGER and ANNA C. YEAGER,

Plaintiffs-Petitioners,

vs.

TOWNSHIP OF MANSFIELD, *et als.*,

Defendants-Respondents.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 21st day of September, 1972.

FLORENCE R. PESKOE
Acting Clerk of the Supreme Court

FILED

September 21, 1972
FLORENCE R. PESKOE
Acting Clerk

APPENDIX B

Per Curiam Opinion of the Supreme Court of New Jersey, Appellate Division

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION A-2463-70

OSCAR YEAGER and ANNA C. YEAGER,

Plaintiffs-Appellants,

v.

TOWNSHIP OF MANSFIELD, WARREN COUNTY, NEW JERSEY, a Municipal Corporation, THE TOWNSHIP COMMITTEE OF MANSFIELD, and THE BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MANSFIELD,

Defendants-Respondents.

Argued June 6, 1972—Decided June 22, 1972.

Before Judges LEWIS, HALPERN and LORA.

Mr. Vincent J. Apruzzese argued the cause for appellants (*Messr. Apruzzese & McDermott,* attorneys; *Mr. Frederick T. Danser, III,* on the brief).

Mr. Harry K. Seybolt argued the cause for respondents (*Mr. Martin Bry-Nildsen, Jr.,* attorney for respondents Township of Mansfield and Township Committee of Mansfield; *Mr. Seybolt,* attorney for respondent

Appendix B

Board of Adjustment of the Township of Mansfield; *Messr. Bry-Nildsen* and *Seybolt* on the brief).

PER CURIAM

When in 1964 defendant Township of Mansfield adopted its first zoning ordinance which did not permit permanent trailers anywhere in the township, the small mobile home park, then consisting of 14 trailers, that plaintiffs had been operating since 1961 assumed a status of a nonconforming use. In 1969 they sought a permit to construct trailer spaces, in addition to the permit issued in 1961 for 28 trailer spaces, to be constructed in an area they had designated "expansion area" on the original plot plan filed with the township. The zoning officer denied the application for an additional permit, and plaintiffs unsuccessfully appealed to the board of adjustment. An action in lieu of prerogative writs then ensued.

Plaintiffs here appeal from a judgment of the Law Division (a) affirming a decision by the board of adjustment that plaintiffs were not entitled to construct, as a valid nonconforming use, additional trailer court spaces in the proposed "expansion area" of their property; (b) sustaining the findings of the board that no special reasons exist to support the granting of a requested use variance, and that the granting thereof would substantially impair the intent and purpose of the local zoning plan; and (c) failing to declare unconstitutional the exclusionary provisions in the township zoning ordinance.

We have studied the record and affirm the judgment under review substantially for the reasons set forth in the opinion of Judge Collins for the Law Division. We are constrained to reach that conclusion in light of the

findings of fact by the trial court, our decisional law adverse to expansions of nonconforming uses, and the policy of our State as expressed in *Vicker* v. *Tp. Com. of Gloucester Tp.*, 37 N. J. 232 (1962), appeal dismissed and *cert.* den. 371 U. S. 233 (1963), reversing the decision of this court in that case reported at 68 N. J. Super. 263 (App. Div. 1961). For a full discussion of the problem see Annotation, "Validity and Application of Zoning Regulations Relating to Mobile Home or Trailer Parks," 42 A.L.R. 3d 598 (1972).

APPENDIX C

Letter Opinion of the Morris County Court

MORRIS COUNTY COURT

Chambers of
JOHN D. COLLINS
Judge

COURT HOUSE
MORRISTOWN, NEW JERSEY

Filed April 30, 1971

"NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

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Appendix C

Re: Oscar Yeager and Anna C. Yeager v. Township of Mansfield, Warren County, New Jersey a Municipal Corporation, The Township Committee of Mansfield, and The Board of Adjustment of the Township of Mansfield. Superior Court of New Jersey, Law Division, Warren County, Docket No. L-33837-69 P.W.

Gentlemen:

This is an action in lieu of prerogative writ appealing the denial of a variance by the Board of Adjustment of Mansfield Township, (Board), and its denial to allow plaintiffs to use their land for mobile homes as a prior nonconforming use.

Since prior to 1960 Oscar and Anna Yeager, (Plaintiffs), were and now are owners of subject property in the Township containing approximately 128 acres designated as Tax Map Lot 4, in Block 402.

In 1960, at which time no zoning ordinance was in effect, plaintiffs applied for and received a license for a trailer court known as "Happy Hill Trailer Court". Also at that time, plaintiffs indicated that a map would be submitted to the Townwship designating the portion of their property to be used for trailer court purposes. Subsequently, this map was filed designating 1200′ frontage on Oxford Road and a depth of 400′ to be used as a trailer court. The designated trailer court area specified use for 28 trailers, and the remaining portion thereof was designated for additional trailers as business warranted.

The plan submitted for the 28 trailer sites contained details of proposed facilities and indicated the additional area fronting on Oxford Road as "expansion area". No

details for water, sewer, roads or the like were contained in this particular section of the map.

The Township of Mansfield, (Township), adopted for the first time on December 15, 1964 a zoning ordinance classifying subject premises in an A-Agricultural district. Trailer courts are not a permitted use therein, nor in any other district in the Township.

Plaintiffs submitted a plot plan entitled "Happy Hill Mobile Park", Mansfield Township, Warren County, New Jersey, March 1969, Robert C. Evertz, Licensed Land Surveyor. This plot plan presented a more detailed plan of the area which had been designated "expansion area" on the 1961 map, said plan by surveyor Evertz proposed to provide additional 42 to 69 trailer spaces in accordance with said 1969 plot plan.

In 1969 plaintiffs filed an application with the Board seeking an interpretation that the "expansion area" could be utilized as a continuing valid nonconforming use or in the alternative, a variance pursuant to New Jersey Statute 40:55-39 (d) for expanding the trailer court use.

There were two hearings before the Board on February 2, 1970 and on May 4, 1970.

The area surrounding plaintiff's property is generally undeveloped land and is suitable for single family residences, which is a permitted use in this district.

Plaintiffs have installed water, sewerage and electrical facilities to service the aforementioned 28 spaces. Plaintiffs had not at any time designed or installed septic tanks or sanitary system to serve the "expansion area". At the hearings before the Board it also developed that no site development whatsoever had been carried out by plaintiff

nor anyone acting for plaintiff on the "expansion area". In order to use the "expansion area" for additional trailers it would be necessary for plaintiffs to grade the area and to erect and install appropriate septic systems, electric service and paved roads. At the first hearing before the Board plaintiffs also indicated that it would probably be necessary to drill another well in order to provide sufficient water for the additional trailer spaces.

At the conclusion of the February 2, 1970 hearing the Board adopted a resolution denying plaintiff's application. In denying the application the Board considered the fact that no expert testimony was offered on whether the granting of the variance could be made without substantial detriment to the public good or without impairment of the intent and purpose of the zone plan and zoning ordinance. The Board further found:

1. That the area designated as "expansion area" on the 1961 map was not being used as a trailer park site at the time of the enactment of the zoning ordinance of December 15, 1964.

2. The plaintiff's plot plan would increase the capacity of the park from 28 to 69 trailers, an increase in excess of 200% of existing capacity.

3. Extensive site development would be required to provide the necessary facilities and no comprehensive plan for sewerage or water services were presented to the Board.

4. Plaintiffs would be required to install an additional well and sanitary facilities since the existing facility was

designed solely for the original park and could not be extended to provide for the expansion.

5. No expenditures had been made by plaintiffs for the physical development of the "expansion area".

6. The property was situated in an A-Agricultural district suitable to the permitted single family residential development.

7. The proposed trailer lots projected by plaintiffs would contain approximately 3500 sq. ft. and would each accommodate a single family unit.

8. The expansion of a high density trailer park to accommodate an additional 42 to 69 trailers for a distance of some 1000′ along Oxford Avenue would adversely affect the development of surrounding properties in accordance with the zoning ordinance and zone plan.

The Board came to the conclusion that no special reasons existed for a favorable recommendation and that the variance, if granted, would substantially impair the intent and purpose of the zone plan and zoning ordinance.

Plaintiffs requested and were given a rehearing on May 4, 1970. The same evidence presented on February 2, 1970 was again presented and considered by the Board. In addition thereto, plaintiffs presented their original letter application dated February 24, 1960 seeking their trailer court license and also presented a description of the trailer court and "expansion area" prepared by Tri-County Engineers and Land Surveyors, Inc., dated March 15, 1960. Also offered in evidence was an article from a local newspaper published approximately one week after

the Township hearing in 1961 indicating that the applicant sought a license in connection with his initial installation.

At the hearing some neighbors appeared indicating they had no objections with plaintiff's application. Plaintiff, Oscar Yeager, testified he had installed 14 units during 1961 and 1962 and after the adoption of the zoning ordinance in 1964 had added some 12 units bringing the total up to 26 of the original 28.

Charles G. Ort, Jr., a real estate expert for 60 years with offices in Hackettstown, N. J. who was familiar with the Township area also testified. He described the area of the premises in question as geenrally undeveloped, and mostly wooded. He said there was a need for a trailer park facility, but he admitted that the area covered by the "expansion area" was adaptable to private residential use.

At the conclusion of the May 4, 1970 hearing the Board requested applicant to prepare a written memorandum of law which was done. The Board considered the transcript of the hearings of February 2nd and May 4, 1970 and the testimony at both hearings and the evidence presented. The Board again denied that the "expansion area" could be used as a valid conforming use and further denied the request for a use variance.

In September 1970 the Township amended its zoning ordinance to permit private camp grounds to be used for family camping activities and for recreational, educational and vacation purposes. This use is completely different from the permanent trailer park requested by plaintiff and is regulated by different neighboring legislation.

Appendix C

Plaintiffs claim three things:

1. The present mobile home park and the "expansion area" is a valid nonconforming use not affected by the 1964 zoning ordinance.

2. Special reasons exist for permitting additional mobile home sites.

3. The zoning ordinance is unconstitutional in that it totally prohibits any trailer court use within the Township.

N.J.S.A. 40:55-48 provides that:

> "Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the building so occupied and any such structure may be restored or repaired in the event of partial destruction thereof."

The spirit underlying this zoning statute is to restrict rather than expand nonconforming uses. *Grundlehner* v. *Dangler*, 51 N. J. Super. 53 (App. Div. 1958); *Ranney* v. *Institute Pontificio Delle Maestre Filippini*, 40 N. J. 189 (1955).

Plaintiff relies on the dictum in the case of *Gross* v. *Allan*, 37 N. J. Super. 262 (App. Div. 1955) where the court stated at page 272:

> "The inception of a nonconforming use on a limited part of a plot does not necessarily constitute a premption of the entirety of the plot for uses of that character, as against a later prohibitory zoning ordinance. *DeVito* v. *Pearsall*, 115 N. J. L. 323,

325 (Sup. Ct. 1935); *Martin* v. *Cestone,* 33 N. J. Super. 267, 270 (App. Div. 1954). The criterion is whether the nature of the incipient nonconforming use, in the light of the character and adaptability to such use of the entire parcel, manifestly implies an appropriation of the entirety to such use prior to the adoption of the restrictive ordinance. *Cf. Lamb* v. *A. D. McKee, Inc.,* 10 N. J. Misc. 649 (Sup. Ct. 1932).

Plaintiffs claim that there has been an "appropriation" since the intention was to use the entire tract and that some action was taken—the map was submitted and monies were actually expended to have a survey taken. However, the *Gross* case cites *Lamb* v. *A. D. McKee, Inc., supra* for the criterion of "appropriation". In that case, the defendant owned a ten acre tract from which he was excavating sand and gravel. This case developed the rule in cases dealing with a "diminishing asset" which is not the case in this appeal.

In *Martin* v. *Cestone,* 33 N. J. Super. 267 (App. Div. 1954) the court there also distinguished the *Lamb* case and stated that "it is an existing *use occupying* the land, that the statute protects; the statute does not deal in mere intentions". *Martin, supra,* p. 269.

Merely declaring that plaintiffs would expand in the future if the demand warrants it, or the use of the terms "proposed trailer park" and "expansion area" do not convert such land to the status of a nonconforming use. The record shows that there was no investment in septic systems, water systems or other facilities to accommodate the expanded use.

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As was stated in *Ardolino* v. *Florham Park Bd. of Adj.*, 24 N. J. 94 (1957):

> ". . . it is the law beyond any question that it is the use in fact existing on the land at the time of the adoption of a new zoning ordinance, and that alone, that may be continued contrary to any new regulations, R.S. 40:55-48; *Struyk* v. *Samuel Braen's Sons*, 17 N. J. Super. 1 (App. Div. 1951), affirmed o.b. 9 N. J. 294 (1952); *Martin* v. *Cestone*, 33 N. J. Super. 267 (App. Div. 1954).

The court went further in *Ardolino* and stated that vacant land could not qualify as a nonconforming use.

Therefore this court finds that plaintiffs were not entitled to construct trailer courts in the "expansion area" as a valid nonconforming use.

The plaintiffs further claim that "special reasons" exist for a variance under N.J.S.A. 40:55-39 (d). These "reasons" given by plaintiff include:

1. The circumstances of plaintiffs.

2. Public need for trailer space.

3. Plaintiffs use of their property has established the character of the neighborhood.

4. The neighbors concur in the development of the area.

5. The Township permitted plaintiffs to start therefore they are estopped now.

In *Andrews* v. *Ocean Township Board of Adjustment*, 30 N. J. 245, 249 (1959), the court stated:

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> "Two critical findings are required by the statute: (1) that the variance 'can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance'; (2) that 'special reasons' exist for the variance.

The applicant for a variance has the burden of furnishing evidence to satisfy the requirements of the statute. *Russell* v. *Board of Adjustment of Tenafly,* 31 N. J. 58 (1959); *Tomko* v. *Vissers,* 21 N. J. 226 (1956).

The action of the Board is entitled to a presumption of validity and will not be set aside unless clearly arbitrary, capricious and unreasonable. *Boove* v. *Board of Adjustment of Emerson,* 100 N. J. Super. 95 (App. Div. 1968); *Alperin* v. *Mayor and Twp. Committee of Middletown,* 91 N. J. Super. 190 (Ch. Div. 1966). In view of the presumption of validity, the judicial review of the action of a Board of Adjustment is limited in its scope. *Peoples Trust Co.* v. *Hasbrouck Heights, etc.,* 60 N. J. Super. 569, 573 (App. Div. 1959).

The affirmative statutory requirement of "special reasons" is an important element of proof of the applicant. It must be shown that the "special reasons" for which a variance is granted must fulfill one of the purposes specified in N.J.S.A. 40:55-32. *Ward* v. *Scott,* 11 N. J. 117, 125 (1952); *Grundlehner* v. *Dangler,* 29 N. J. 256, 266 (1959).

The said statute provides:

> "Such regulations shall be in accordance with a comprehensive plan and designed for one or more of the following purposes: to lessen congestion in the streets; secure safety from fire, flood, panic and

other dangers; promote health, morals or the general welfare; provide adequate light and air, prevent the overcrowding of land or buildings; avoid undue concentration of population. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality. As amended L.1964, c. 150, § 1.

In *Andrews* v. *Ocean Township, supra,* the court stated that no definition for "special reasons" has been attempted and a precise formula is not feasible, therefore each case must turn on its own facts.

In addition to requiring that "special reasons" be found for the granting of a variance under N.J.S.A. 40:55-39 (d), there must also be a finding that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

This fixed and far reaching restriction represents a requisite in addition to and not substitutionary for the affirmative requirement. *Skaf* v. *Zoning Bd. of Adj. of Asbury Park,* 35 N. J. Super. 215, 222 (App. Div. 1955); *Schoelppie* v. *Woodbridge Twp.,* 60 N. J. Super. 146, 150 (App. Div. 1960).

As to this second criteria the Board found, and the record seems to support its determination, that the granting of this variance would substantially impair the intent and purpose of the zone plan and zoning ordinance.

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As to the "special reason" criteria the only reason given by plaintiff that is worth mention is that of need of housing. This would not constitute a "special reason" because since the property can be used for residential purposes the need will be satisfied. This court does not believe that mobile home parks is the only answer to the housing shortage. On this subject plaintiff brings to the attention of this court and relies on a recent New Jersey Supreme Court case of *DeSimone* v. *Greater Englewood Housing Corp.* No. 1, 56 N. J. 428 (1970). In that case the court held that *public* or *semi-public* housing accommodations to provide safe, sanitary and decent housing, to relieve and replace substandard living conditions or to furnish housing for minority or underprivileged segments of the population outside of ghetto areas is a "special reason". However, in this case we do not have "public" housing; we are not dealing with any substandard living condition; nor are plaintiffs attempting to furnish housing for those segments of the population outside of a ghetto area.

In *Rexon* v. *Board of Adjustment, Haddonfield,* 10 N. J. 1 (1952) the court, dealing with a variance under N.J.S.A. 40:55-39 (c), stated that the evidence was sufficient to support a finding of the Board of Adjustment that a variance could not be granted without substantial detriment and impairing the intent of the zoning plan, if, viewed in the setting of its environment, the property may reasonably be adapted to a permitted use. In this case we have the testimony of plaintiffs own expert who admitted that the area covered by the "expansion area" was adaptable to private residential use.

Finally, plaintiffs say that the 1964 zoning ordinance as it affects their property is unconstitutional in that it totally prohibits any trailer court useage within the Township of Mansfield.

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The Supreme Court in New Jersey in the case of *Vickers* v. *Twp. Committee of Gloucester Twp.*, 37 N. J. 232 (1962) held that a zoning ordinance precluding trailer camps and trailer parks was valid. In deciding the question of total exclusion the court stated:

> "The role of the judiciary in reviewing zoning ordinances adopted pursuant to the statutory grant of power is narrow. The court cannot pass upon the wisdom or unwisdom of an ordinance, but may act only if the presumption in favor of the validity of the ordinance is overcome by an affirmative showing that it is unreasonable or arbitrary. *Kozesnik* v. *Township of Montgomery,* 24 N. J. 154, 167, 131 A. 2d 1 (1957); See Cunningham, Control of Land Use in New Jersey, 14 Rutgers L. Rev. 37, 48 (1959). By these standards which control judicial review, the plaintiff to prevail must show beyond debate that the Township in adopting the challenged amendment transgressed the standards of R.S. 40:55-32, N.J.S.A. In other words, if the amendment presented a debatable issue we cannot nullify the Township's decision that its welfare would be advanced by the action it took."

It had been decided earlier in *Fanale* v. *Borough of Hasbrouch Heights,* 26 N. J. 320, 325 (1958) that a municipality does not have to provide for every use somewhere within its borders.

The plaintiffs make a strong argument for not following *Vickers, supra,* however, that question is not for this court but for the Legislature.

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Therefore, this court finds that the zoning ordinance of the Township of Mansfield is constitutional and this appeal is denied.

An order, consented to as to form or on notice, is to be submitted.

Yours very truly,

JOHN D. COLLINS

JDC:eeb

APPENDIX D

Constitutional Provisions Involved

The relevant provisions of the United States Constitution are as follows:

U.S.C.A. Const. Art. 6, cl. 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

U.S.C.A. Const. Amend. 14, sec. 1

• • •

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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Statutes Involved

The relevant provisions of the Veterans' Housing Act of 1970, as amended, (84 Stat. 1108, 38 U.S.C.A. 1801 et seq. are as follows:

Section 1819 (a)

> "Notwithstanding any other provision of this chapter, any veteran eligible for loan guaranty benefits under this chapter who has maximum home loan guaranty entitlement available for use shall be eligible for the mobile home loan guaranty benefit under this section. Use of the mobile home loan guaranty benefit provided by this section shall preclude the use of any home loan guaranty entitlement under any other section of this chapter until the mobile home loan guaranteed under this section has been paid in full."

The relevant provisions of the Housing and Urban Development Act of 1969, as amended, (83 Stat. 379, 12 U.S. C.A. sec. 1701 et seq.) are as follows:

Section 1703 (a)

> "The Secretary is authorized and empowered upon such terms and conditions as he may prescribe, to insure banks, trust companies, personal finance companies, mortgage companies, building and loan associations, installment lending companies and other such financial institutions which the Secretary finds to be qualified by experience or facilities and approves as eligible for credit insurance, against losses which they may sustain as a result of loans and advances of credit, and purchases of obliga-

tions representing loans and advances of credit, made by them on and after July 1, 1939, and prior to October 1, 1972, for the purpose of . . . (ii) financing the purchase of a mobile home to be used by the owner as his principal residence."

Section 1703 (b)

"No insurance shall be granted under this section to any such financial institution with respect to any obligation representing any such loan, advance of credit, or purchase by it (1) if the amount of such loan, advance of credit, or purchase exceeds $5,000, except that an obligation financing the purchase of a mobile home may be in an amount not exceeding $10,000 ($15,000 in the case of a mobile home composed of two or more modules);"